[Cite as *State v. Jones*, 2012-Ohio-1480.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-044
	:	O P I N I O N
- vs -		4/2/2012
	:	
MATTHEW L. JONES,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CR27127

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Matthew L. Jones, appeals from a judgment entry of the Warren County Court of Common Pleas sentencing him to six years in prison for felonious assault after a jury found him guilty of that offense and felony domestic violence. We affirm Jones' conviction for felonious assault, but vacate the trial court's determination, made pursuant to the jury's verdict, that he was guilty of *felony* domestic violence and modify it to a

determination that he was guilty of *misdemeanor* domestic violence. We do so for the reason that the state failed to present sufficient evidence to show that Jones had a prior conviction for domestic violence, and thus failed to present the evidence needed to elevate the domestic violence charge from a misdemeanor to a felony.

{¶ 2} On the night of December 17, 2010, Jones and his girlfriend, Angela Seiler, purchased two bottles of vodka and drank them at the home of Jones' mother where Jones and Seiler were residing. Seiler got into an argument with Jones when she caught him looking at pornography on the computer. Jones attacked Seiler, punching and kicking her entire body, but mainly her ribs. Seiler curled up in a ball and begged Jones to stop. Jones then left to go to Target to buy Seiler some Christmas presents. When Jones returned, Seiler told him she needed help. Jones called for emergency assistance and apparently told the 911 dispatcher that Seiler was suffering an allergic reaction. Seiler was taken to Bethesda Arrow Springs Hospital where it was determined that she needed more specialized care. As a result, she was airflighted to University Hospital in Cincinnati where it was discovered she had several broken ribs.

{¶ 3} On January 18, 2011, Jones was indicted for felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, and domestic violence in violation of R.C. 2919.25(A), a felony of the fourth degree. Jones was tried by a jury, which found him guilty on both counts. The trial court determined the offenses to be allied offenses of similar import and ordered them merged for purposes of sentencing. After the state elected to proceed on the felonious assault charge the trial court sentenced Jones to six years in prison.

{¶ 4} Jones now appeals, assigning the following as error:

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF FELONIOUS ASSAULT.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF DOMESTIC VIOLENCE.

{¶ 9} We shall address Jones' assignments of error together since they are closely related.

{¶ 10} Jones essentially raises three arguments in this appeal. First, he argues his trial counsel provided him with ineffective assistance by not offering to stipulate to his prior conviction for domestic violence, because the admission of the judgment entry of his prior conviction for that offense was "highly and inherently prejudicial." We disagree with this argument.

{¶ 11} To establish a claim of constitutionally ineffective assistance of counsel, a criminal defendant must show that his trial counsel's performance was "deficient" in that it "fell below an objective standard of reasonableness," and that he suffered "prejudice" as a result of that deficient performance in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant must establish both the "performance" and "prejudice" prongs of the *Strickland* standard to prevail on an ineffective assistance claim. *Id.* at 687. An appellate court must give wide deference to the strategic and tactical choices made by trial counsel in determining whether counsel's performance was constitutionally ineffective. *Id.* at 689.

{¶ 12} Jones was charged in count two of the indictment with domestic violence in violation of R.C. 2919.25(A). Generally, a violation of R.C. 2919.25(A) is a first-degree misdemeanor, but the charge is elevated to a fourth-degree felony if the defendant previously has been convicted of domestic violence or one of the other offenses listed in that section.

R.C. 2919.25(D)(2) and (3). Because a prior conviction for domestic violence raises the degree of a subsequent charge of domestic violence, the prior conviction is an essential element of the subsequent charge, and therefore must be proven beyond a reasonable doubt. *State v. Russell*, 12th Dist. No. CA98-02-018, 1998 WL 778312, at *2 (Nov. 9, 1998). This court has held that since the prior conviction is an essential element of the offenses the state is not required to accept a defendant's stipulation to a prior conviction. *Id*.

{¶ 13} Jones argues the trial court would have been obligated to accept his trial counsel's offer to stipulate to his prior conviction for domestic violence under *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644 (1997). In that case, the defendant was charged with violating a federal statute that prohibited possession of a firearm by anyone with a prior felony conviction. *Id.* at 174-175. The defendant offered to stipulate that he had a prior felony conviction, and moved to have the prosecution prohibited under Fed.R.Evid. 403 from revealing to the jury the nature and name of that prior felony conviction on the ground that the danger of unfair prejudice outweighed its probative force. *Id.* at 175-176. The trial court rejected the defendant's offer to stipulate to his prior felony conviction and allowed the prosecution to introduce into evidence a judgment entry disclosing the name and nature of the defendant's prior felony conviction, i.e., assault causing bodily injury. *Id.* at 177.

{¶ 14} The Ninth Circuit Court of Appeals upheld the trial court's decision, but the United States Supreme Court reversed. *Id.* at 177-178. In a sharply divided 5-4 decision, the Supreme Court held that the trial court abused its discretion by refusing to accept the defendant's proposed stipulation and admitting into evidence a judgment entry disclosing the name and nature of the defendant's prior felony conviction. *Id.* at 180-186. The court found that in light of the proposed stipulation, the minimal probative value of the judgment entry revealing the name and nature of the defendant's prior felony conviction was substantially outweighed by the danger of unfair prejudice, and therefore the trial court erred by admitting

the judgment entry. *Id.* at 182-185.

{¶ 15} Jones, relying on *Old Chief*, argues his trial counsel's failure to offer to stipulate to his prior conviction for domestic violence did not meet an objective standard of reasonableness and prejudiced him by allowing evidence that otherwise would not have been admissible. However, as we stated in *Russell*, *Old Chief* is inapplicable to this case because *Old Chief* construed the Federal Rules of Evidence and thus is not controlling authority in this state. *Russell*, 12th Dist. No. CA98-02-018, 1998 WL 778312, at *2-3.

{¶ 16} Even if *Old Chief* was controlling authority here, it would not have obligated the trial court to exclude evidence of Jones' prior domestic violence conviction. In *Old Chief*, the majority found that evidence of the name and nature of the defendant's prior felony conviction had minimal probative value, because under the federal statute with which the defendant had been charged, Congress listed a number of felony convictions that qualified as sufficient to bar the defendant from possessing a firearm, and therefore the name and nature of the qualifying felony conviction was not needed. *Id.* at 652, 655. The majority also found that the defendant's stipulation provided the trial court with an evidentiary alternative that "would, in fact, have been not merely relevant but seemingly conclusive evidence of the [prior felony conviction] element." *Id.* at 653.

{¶ 17} By contrast, in this case, the evidence concerning the name and nature of Jones' prior domestic violence conviction did have substantial probative value, because under R.C. 2919.25(D), the state was required to prove beyond a reasonable doubt that Jones had a prior conviction for domestic violence or one of the other specific crimes set forth therein. *Russell*, at *4. Also, Jones has not suggested any evidentiary alternative that would have had the same probative value as the evidence presented by the state. *See id*. Admittedly, the admission of evidence of Jones' prior domestic violence conviction created a potential risk that the jury would find him guilty of the charges of felonious assault and

domestic violence in the underlying case on the basis of his past conviction for domestic violence. *Id.* However, this potential risk of unfair prejudice arises from the wording of the statute itself. *Id.*

{¶ 18} We acknowledge that other appellate districts in this state have found *Old Chief* to constitute persuasive authority and have cited it in reversing convictions where the state has refused to accept a defendant's offer to stipulate to his prior conviction. *See, e.g.*, *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, at ¶ 144-148. Moreover, when the Ohio Supreme Court dismissed, "for want of conflict," an appeal from the Ninth Appellate District's decision in *State v. Baker*, 9th Dist. No. 23713, 2009-Ohio-2340, which it initially had certified as being in conflict with a judgment from another appellate district, Justice Lundberg Stratton, Chief Justice Brown, and Justice Pfeifer dissented, stating that trial counsel's failure to object to the admission of the judgment entries of the defendant's prior convictions could be grounds for establishing ineffective assistance of counsel, and that they "would adopt the holdings of *Old Chief* " and apply its reasoning in this state. *State v. Baker*, 126 Ohio St.3d 1215, 2010-Ohio-3235, ¶ 1, 4-6.

{¶ 19} Notwithstanding the foregoing, we continue to adhere to our past precedent in *Russell* for the reasons stated therein. In light of the foregoing, we conclude that Jones has failed to establish that his trial counsel provided him with ineffective assistance by not offering to stipulate to his prior conviction for domestic violence.

{¶ 20} Jones' second argument is that his conviction for felonious assault was not supported by the sufficiency and weight of the evidence because there was no evidence presented that he caused *serious* physical harm to Seiler, with Jones defining "serious" as meaning "not just a bruise." Jones argues the evidence showed that Seiler's injuries resulted from "something preexisting," pneumonia, or the emergency aid administered to her. We find these arguments unpersuasive.

{¶ 21} As we recently stated in *State v. Collins*, 12th Dist., Nos. CA2010-12-021, CA2010-12-022, 2012-Ohio-430, ¶ 12-14:

> Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins,* 78 Ohio St.3d 380, 386 (1997). An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Layne,* 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 23. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks,* 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.
>
> Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Layne* at ¶ 24. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Under a manifest weight challenge, the question is whether, in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Id.* This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*
>
> Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. *State v. Wilson,* 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez,* 12th Dist. No. CA2008-07-162, 2009-Ohio-4460, ¶ 62.

{¶ 22} R.C. 2903.11(A)(1) defines the offense of felonious assault to prohibit any person from knowingly causing "serious physical harm" to another. R.C. 2901.22(B) provides that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature[,]" and that "[a]

person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.01(A)(5) defines "serious physical harm to persons" to mean any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
> (b) Any physical harm that carries a substantial risk of death;
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶ 23} Seiler testified that on the night in question, she and Jones had been drinking Vodka when the two of them began arguing after she saw him looking at pornography on the computer. She testified that Jones "just attacked" her by punching and kicking her, mainly in the ribs, and that she curled up in a ball and begged him to stop, and even offered not to tell anyone that he had attacked her and to explain to everyone that she simply had had a seizure. Seiler testified that she remembered being carried out of the residence on a stretcher and being taken to Bethesda Arrow Springs Hospital, and also remembered "little bits and pieces of being air flighted," though she could not say where she had been flown. Seiler could not recall what treatments had been administered to her at University Hospital, stating, "I just know that I had broken ribs and lung problems and scars from where they put tubes in me."

{¶ 24} Seiler's testimony was supported by testimony from several other witnesses, including her and Jones' neighbor, Penny Sargeant, whom they had lived with for a period of time before moving in with Jones' mother. Sargeant testified that on the night in question, Jones came to her residence and asked her to come to their home because Seiler was

having an allergic reaction. When Sargeant came to Jones and Seiler's residence, she saw that Seiler was "horribly swollen" and was holding her head and crying. Sargeant stated that Jones told her that "he didn't touch [Seiler], he didn't hurt her."

{¶ 25} EMT Garrett Murphy and Warren County Sheriff's Deputy Steven Ritchie also testified that Seiler was heavily swollen when they arrived at Jones and Seiler's residence. Seiler's mother, Debra Kester, testified that when she saw Seiler at University Hospital the day after the attack, Seiler's "eyes were swollen shut." Kester testified that Seiler had severe bruising, "swollen places," cuts, and scratches on her chin and forehead, and that she "was swollen so bad that she looked like if you'd touched her with a pin she would had [sic] popped." Kester testified that Seiler was in intensive care for two weeks following the attack, during which time Seiler's lungs collapsed and Seiler contracted pneumonia. Seiler's testimony was also supported by the admission into evidence of photographs taken of her that depicted the injuries she sustained as a result of Jones' attack on her, as well as photographs of the crime scene that showed blood on pillows, a comforter, and the carpet in their residence, which, according to Seiler, had not been present before the attack.

{¶ 26} Jones points out that Seiler acknowledged several times during her testimony that her memory was not clear on the details of what happened to her on the night in question. He also notes that Seiler testified that blood was all over her face when the paramedics arrived, but that other witnesses, including EMT Murphy, testified that they did not notice any bruises or cuts on her when they first saw her. Jones also points out that Seiler's symptoms were consistent with pneumonia, which she has had 13 times in the past; that Seiler responded well to the anti-allergy medication that was administered to her by EMT Murphy after he had been informed by the 911 dispatcher that Seiler was having an allergic reaction; and that EMT Murphy acknowledged under cross-examination that he was aware that coughing caused by pneumonia can be severe enough to crack ribs. Jones

acknowledges that Seiler had two broken ribs, but points to Seiler's testimony indicating that she had sustained these two broken ribs from another incident a few weeks before the incident in question.

{¶ 27} Seiler did acknowledge on cross-examination that she had sustained two broken ribs as a result of Jones attacking her a couple of weeks prior to the incident in question. However, on redirect, she testified that she left the hospital with three broken ribs on one side and two on the other, "or something like that," and that these broken ribs were in addition to the two broken ribs she had sustained two weeks prior to the incident in question. A CT scan taken of Seiler shortly after the incident revealed that she had "displaced fractures of the dorsal right 9th through 12th ribs[,]" that "[t]here is a mildly displaced fracture [of] the dorsal left 10th rib[,]" and that "[i]n addition, there is a subacute healing fracture of the dorsal lateral left 9th rib." Another CT scan taken several days later revealed that Seiler's lungs had both collapsed. Moreover, Kester's testimony indicated that Seiler's bruises, cuts, and scratches became visible after her swelling went down.

{¶ 28} "A defendant is not entitled to a reversal on manifest weight grounds simply because there was inconsistent evidence presented at trial." *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 61. Seiler testified that her lungs had not collapsed in the past as a result of her having pneumonia, and that she did not have any injuries prior to the attack other than the two broken ribs she sustained when Jones attacked her two weeks before the incident in question. She also testified that she was not allergic to anything. A jury is in the best position to take into account the witnesses' demeanor and thus to assess their credibility, and therefore is entitled to believe or disbelieve all, part, or none of the testimony of a witness. *Id.* It is apparent that the jury in this case chose to believe Seiler.

{¶ 29} After reviewing the entire record, weighing the evidence and all reasonable inferences that can be drawn from it, and considering the credibility of witnesses, the jury's

verdict finding Jones guilty of every material element of felonious assault was not contrary to the manifest weight of the evidence, since there was ample evidence presented showing that it was Jones who caused the serious physical harm to Seiler, and not anyone or anything else, and that the harm he caused her was "serious physical harm," as defined for purposes of R.C. 2903.11(A)(1). *Collins*, 12th Dist., Nos. CA2010-12-021, CA2010-12-022, 2012-Ohio-430, ¶ 12-14. It follows that the jury's verdict finding Jones guilty of felonious assault was supported by sufficient evidence, as well. *Id.*

{¶ 30} Jones' third argument is that his conviction for felony domestic violence was contrary to the sufficiency and manifest weight of the evidence.

{¶ 31} R.C. 2919.25(A) prohibits any person from knowingly causing or attempting to cause physical harm to a family or household member. As noted earlier, a violation of R.C. 2919.25(A) is a first-degree misdemeanor unless the offender previously has pleaded guilty to or been convicted of domestic violence or one of the other specific crimes listed in R.C. 2919.25(D), in which case a violation of R.C. 2919.25(A) is a fourth-degree felony. R.C. 2919.25(D)(2) and 2919.25(D)(3).

{¶ 32} Here, the state presented ample evidence to convict Jones of every material element of *misdemeanor* domestic violence, and a decision finding him guilty of that offense cannot be found to be against either the sufficiency or manifest weight of the evidence. However, in order for the domestic violence charge to be elevated from a misdemeanor to a felony, the state had to show that Jones had a prior conviction for either domestic violence or one of the other qualifying offenses listed in R.C. 2919.25(D)(3). R.C. 2945.75(B) allows the state to prove a prior conviction by introducing a certified copy of the judgment entry of the prior conviction, along with evidence sufficient to establish that the defendant named in the judgment entry is, in fact, the defendant in the case at bar. *State v. McDowell*, 150 Ohio App.3d 413, 2002-Ohio-6712, ¶ 7 (7th Dist.).

{¶ 33} In this case, the state presented a 2007 judgment entry from the Portsmouth Municipal Court showing that a "Matthew L. Jones" had been convicted of domestic violence under R.C. 2919.25(A) following his no contest plea to that charge. However, the state acknowledges that it failed to present evidence at trial showing that the Matthew L. Jones in this case is the same person as the Matthew L. Jones named in the 2007 judgment entry.[1] Nevertheless, the state argues that even though it failed to present sufficient evidence to prove the "identity" element of felony domestic violence, Jones' argument is moot because he has not suffered any prejudice from his conviction on that charge since it was merged with his conviction on the charge of felonious assault and the state elected to have him sentenced on his felonious assault conviction. We find this argument unpersuasive.

{¶ 34} In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12, the court found that for purposes of R.C. 2941.25, the term "conviction" means a finding or determination of guilt *plus* the sentence or other penalty imposed. The *Whitfield* court stated that "[i]n cases in which the imposition of multiple punishments is at issue, R.C. 2941.25(A)'s mandate that a defendant may be 'convicted' of only one allied offense is a protection against multiple sentences rather than multiple convictions." *Id*. at ¶ 18. The court concluded that "[b]ecause R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. [Footnote omitted.] *Thus, the*

1. The state argued in its appellate brief that the indictment in this case provided sufficient evidence to prove the identity element of the felony domestic violence charge, since the indictment showed that the Matthew L. Jones in this case has the same date of birth and the same last four digits in his social security number as the Matthew L. Jones named in the 2007 judgment entry. This information was actually contained in the "Prosecuting Attorney's Request For Issuance [of] Warrant Upon Indictment," which was filed in the trial court immediately after the indictment in this case was filed. However, the state acknowledged during oral argument that the indictment and, presumably, the request for issuance of warrant, was never admitted into evidence and thus was not seen by the jury. A review of the evidence admitted in this case confirms that neither the indictment nor the request for issuance of a warrant was admitted into evidence at Jones' trial.

trial court should not vacate or dismiss the guilt determination." (Emphasis added.) *Id.* at ¶ 27.

{¶ 35} Therefore, under *Whitfield*, the trial court's determination that Jones was guilty of felony domestic violence "remain[ed] intact, both before and after the merger of" that offense with the offense of felonious assault for purposes of sentencing. *Id*. Moreover, we reject the state's argument that Jones was not prejudiced as a result of the trial court's erroneous determination, made pursuant to the jury's verdict, that he was guilty of felony domestic violence since his conviction on that charge was merged with his conviction for felonious assault, and the state elected to have him sentenced for felonious assault conviction.

{¶ 36} In *State v. Underwood*, 124 Ohio St.3d 365, 124 Ohio St.3d 365, ¶31, the court stated that "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." In support, the Ohio Supreme Court relied upon several appellate court decisions, including *State v. Gilmore*, 1st Dist. Nos. C-070521, C-070522, 2008-Ohio-3475, ¶ 17; and *State v. Coffey*, 2nd Dist. No. 2006 CA 6, 2007-Ohio-21, ¶ 14. In *Gilmore*, the First District held that it was "prejudicial plain error to impose multiple sentences" on a defendant for his convictions on the allied offenses of possession of cocaine and trafficking in cocaine even though the trial court imposed the sentences concurrently, "because the defendant's 'criminal record will reveal convictions for two felonies' when the defendant has committed only one criminal act.'" *Id.* at ¶ 16-17, quoting *State v. Fields*, 97 Ohio App.3d 337, 347-348 (1st Dist.1994), quoting *State v. Burl*, 1st Dist. Nos. C-920167 and C-920194, 1992 WL 380020 (Dec. 16, 1992). Likewise, in *Coffey* at ¶ 14, the Second District held:

> [I]t is proper to engage in plain error analysis in a case concerning alleged allied offenses of similar import even though the sentences for said offenses were to run concurrently.

> Clearly, a defendant's substantial rights are violated when he or she is convicted and sentenced for two felonies instead of just one, regardless if the trial court orders concurrent sentences.

{¶ 37} Therefore, we find that a defendant is prejudiced by a determination that he is guilty of a felony offense even when a sentence or other penalty is not imposed as a result of that determination.

{¶ 38} In light of the foregoing, we conclude that while the state presented sufficient evidence to convict Jones of *misdemeanor* domestic violence and his conviction on that charge cannot be deemed to be against the manifest weight of the evidence, the state failed to present sufficient evidence to prove that Jones had a prior conviction for domestic violence and thus failed to present sufficient evidence to elevate the domestic violence charge in this case from a misdemeanor to a felony.

{¶ 39} Accordingly, Jones' first assignment of error is overruled, but his second assignment of error is sustained to the extent indicated.

{¶ 40} Jones' conviction and sentence for felonious assault is affirmed, but the trial court's determination that Jones is guilty of *felony* domestic violence is modified to reflect that Jones is guilty of *misdemeanor* domestic violence. As so modified, the trial court's judgment is affirmed.

POWELL, P.J., and RINGLAND, J., concur.